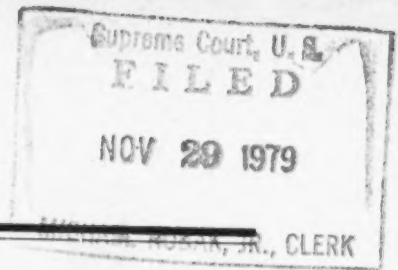


No. 79-555



In the Supreme Court of the United States
OCTOBER TERM, 1979

CLYDE R. DONNELL, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

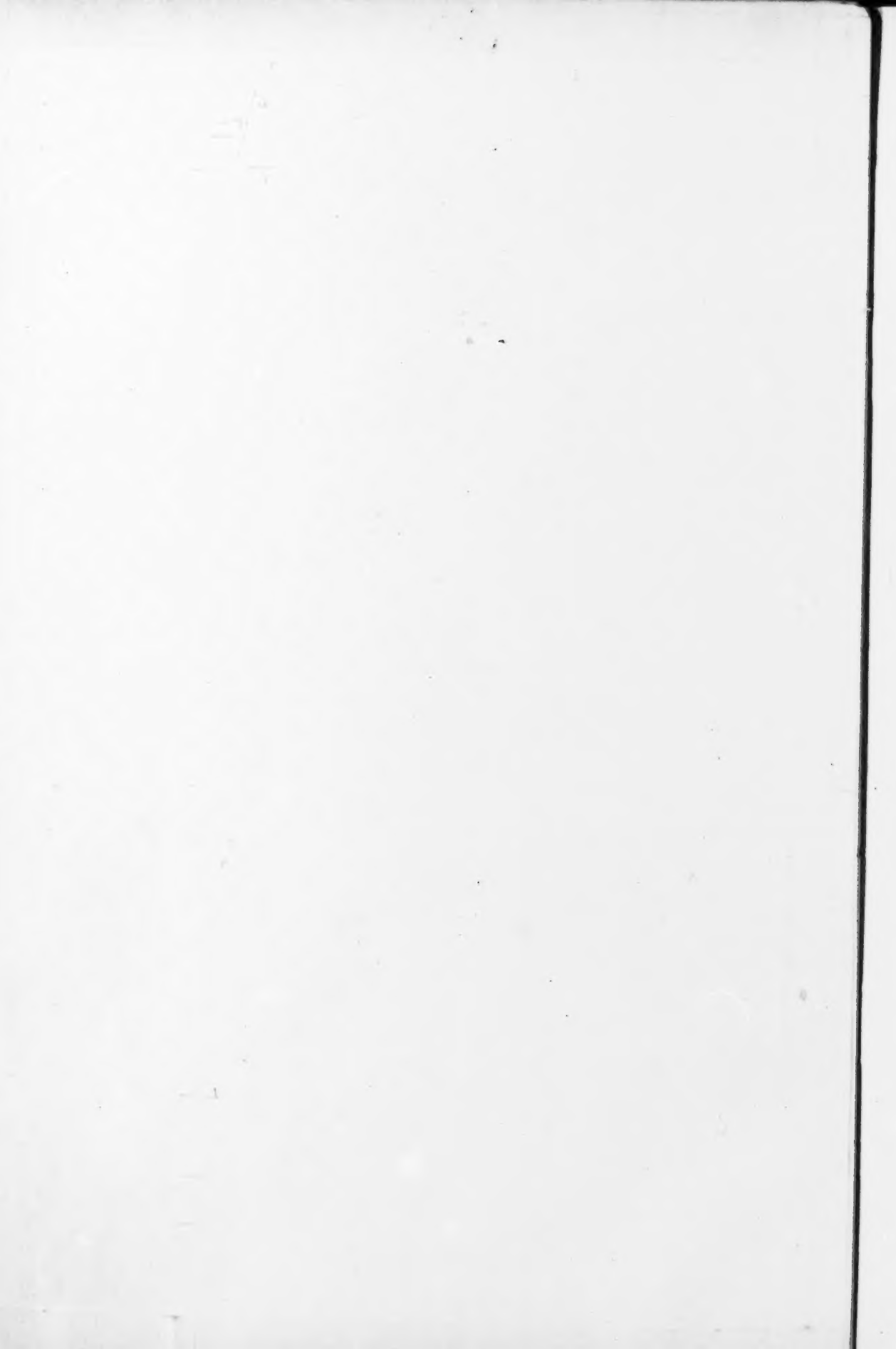
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF THE UNITED STATES TO AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 2a-12a) has not been reported.

JURISDICTION

The order of the three-judge district court was issued on July 31, 1979 (J.S. App. 1a). The no-

tice of appeal was filed on August 6, 1979 (J.S. 2; J.S. App. 39a). The jurisdictional statement was filed on October 4, 1979. The jurisdiction of this Court is invoked under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, provides in pertinent part:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such * * * standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such * * * standard, practice, or procedure: *Provided*, That such * * * standard, practice, or procedure may be enforced without such proceeding if * * * [it] has been submitted by the chief legal officer * * * of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission * * *.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that appellants failed to establish that their proposed redistricting plan did not have the purpose, and would not have the effect, of abridging the right to vote on account of race.

2. Whether the district court erred in declining to retain jurisdiction over this case.

STATEMENT

1. Appellants, the members of the Board of Supervisors of Warren County, Mississippi, brought this action under Section 5 of the Voting Rights Act to obtain a declaratory judgment that a proposed redistricting plan for the county's five supervisor districts "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (J.S. App. 2a). That proposed plan was one of several with which appellants sought to replace a districting plan adopted for Warren County in 1929. The 1929 plan was used until 1971 (J.S. App. 4a); but by 1970, population shifts had produced substantial malapportionment among its districts.

In 1970, the Board of Supervisors adopted a reapportionment plan and, pursuant to Section 5, submitted it to the Attorney General for preclearance (J.S. App. 4a-5a). Despite the fact that the Attorney General objected to the 1970 plan, elections were held in 1971 on the basis of that plan (J.S.

App. 5a). In 1973, the Attorney General brought an action in the United States District Court for the Southern District of Mississippi (the "Mississippi court") to enjoin further use, in violation of Section 5, of the 1970 plan (J.S. App. 5a). In 1975, the three-judge Mississippi court granted summary judgment in favor of the United States and enjoined the holding of elections on the regularly scheduled dates in 1975 (J.S. App. 5a).¹ In 1976, the Mississippi court ordered into effect a redistricting plan proposed by the county (*ibid.*). The United States appealed the latter order, and this Court reversed, holding that, in issuing that order, the Mississippi court had exceeded the jurisdiction conferred on it by Section 5. *United States v. Board of Supervisors*, 429 U.S. 642 (1977).

In 1978, the Board of Supervisors adopted a new redistricting plan and, without submitting the plan to the Attorney General, commenced the present action in the United States District Court for the District of Columbia seeking preclearance.

2. On July 31, 1979, the district court entered its order denying preclearance (J.S. App. 1a). In a preclearance action under Section 5, the jurisdiction seeking a declaratory judgment has the burden of establishing the absence of both discriminatory purpose and discriminatory effect. See, *e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). In the

¹ No Board of Supervisors election was held in Warren County in 1975.

present case, the district court concluded that appellants failed to make either showing.

The court concluded that the absence of a discriminatory effect was not established because appellants failed to show that the plan would not lead to a retrogression in the position of blacks "with respect to their effective exercise of the electoral franchise" (J.S. App. 11a, quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). The court's conclusion regarding retrogression was based upon its finding that, in contrast to the pre-existing 1929 plan, the proposed plan contained no district in which blacks had an equal chance to elect a candidate of their choice (J.S. App. 9a-10a). The 1929 plan included one such district—that is, a district in which blacks constituted a sufficiently large percentage of the voting-age population (60%) that, despite the residual effects of past discrimination on black political participation, blacks had as great a chance as whites to elect a candidate of their choice (J.S. App. 9a).²

Because appellants had not justified the diminution of black voting strength under the proposed plan or the "grossly irregular proposed district boundaries in the City of Vicksburg which fragment black resi-

² Under the 1929 plan, blacks constituted the following percentages of the voting-age population of the five districts (J.S. App. 4a): (1) 36.4, (2) 60.2, (3) 45.9, (4) 50.5, and (5) 16.2.

Under the proposed 1978 plan, blacks constituted the following percentages of the voting-age population (J.S. App. 7a): (1) 57.2, (2) 58.0, (3) 37.2, (4) 22.6, and (5) 18.7.

dential areas," the district court found that appellants had also failed to demonstrate the absence of discriminatory purpose (J.S. App. 12a).

Accordingly, the request of appellants for a declaratory judgment was denied.³

3. On August 30, 1979, seven white residents of Warren County brought an action in the United States District Court for the Southern District of Mississippi to enjoin the Warren County Election Commission from holding an election on the basis of the 1929 plan. *Stokes v. Warren County Election Commission*, Civ. Action No. J79-0425(c) (J.S. App. 19a). Black residents intervened, as did the members of the Board of Supervisors (appellants in the present case). On September 7, that court issued a temporary restraining order barring the use of the 1929 plan (J.S. App. 24a); and on September 20, it issued an order adopting an interim districting plan and directing the county to hold a special election, under the interim plan, on November 27, 1979 (J.S. App. 25a).⁴

³ Several black residents of Warren County intervened in this action. After the July 31, 1979, order was issued, they filed a motion for clarification of the order and for other relief. On August 23, the district court entered an order stating, in part, that "an election should be conducted under the * * * [1929 plan], pending preclearance of any new procedures" (J.S. App. 13a).

⁴ The Board of Supervisors has appealed to the United States Court of Appeals for the Fifth Circuit. *Stokes v. Warren County Election Commission*, No. 79-3388. The Board moved for a stay of the order in *Stokes* pending the decision

ARGUMENT

There are two independent bases for the decision of the district court—the failure of the appellants to show the absence of discriminatory effect and their failure to show the absence of discriminatory purpose. The court found that the loss of a district in which blacks had an equal chance of electing a candidate of their choice amounted to a retrogression under this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976). With regard to purpose, the district court found that the Board had failed to carry its burden because it offered no valid non-racial explanation for the irregular districts that fragmented the black population of Vicksburg and resulted in a retrogression in black voting strength. The district court's conclusions reflect the application of settled law to factual findings that are fully supported by the record. The decision presents no issue requiring plenary consideration by this Court.

1. The district court, in applying the retrogression test of *Beer*, compared the proposed 1978 plan with the 1929 plan (J.S. App. 4a). Under the 1929 plan, the two districts with the largest proportion of blacks have voting-age populations that are 60.2% and 50.5% black. Under the 1978 plan, two districts

of this Court in the present case. On October 15, 1979, that motion was denied by the court of appeals.

The Board then filed in this Court an application for stay of the mandate of the district court in *Stokes*. On October 26, 1979, Mr. Justice Powell denied the request for a stay, *sub nom. Donnell v. Thomas*, No. A-352.

are predominantly black, having voting-age populations that are 57.2% and 58% black.

The black voting-age population increased in one district and decreased in another under the 1978 plan; but because of the percentages involved, the district court concluded that the plan as a whole was retrogressive. Specifically, the court concluded that, in contrast to the 1929 plan, "under the proposed plan, it is unlikely that black citizens will be able to elect a candidate of their choice in any of the districts" (J.S. App. 9a-10a). This finding was based upon particular characteristics of Warren County elections (J.S. App. 9a):

Racial bloc voting combined with Warren County's past history of discrimination and resulting low black voter registration and turnout for elections make it necessary for an electoral district in Warren County to contain a substantial majority of black eligible voters in order to provide black voters with an equal chance to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances, a district should contain a black population of at least 65 percent or a black VAP [voting-age population] of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.^[5]

⁵ Appellants contend that it was improper for the district court to consider the evidence upon which this finding is based (J.S. 20-21), but they do not challenge directly the validity of the finding.

The decrease in the black voting-age population (from 60.2% to 58%) in one district under the 1978 plan, as compared with the preexisting 1929 plan, was thus not offset by the increase in the black voting-age population (from 50.5% to 57.2%) in another district. For the net result was the loss of the only district in which blacks had an equal chance of electing a candidate of their choice.⁶ The court thus properly concluded that appellants had failed to show that the proposed plan would not lead to retrogression in the position of blacks (J.S. App. 11a).

2. Appellants assert (J.S. 13-21) a conflict between the decision below and this Court's ruling in *Beer v. United States*, *supra*. But there is no basis for that claim. On the contrary, the district court applied the *Beer* retrogression test and, for the reasons outlined above, did so correctly. It reached a result different from the result in *Beer* because the

⁶ Appellants appear to suggest (J.S. 14 n.17) that the position taken by the United States (and accepted by the district court) in the present case is inconsistent with views expressed in our jurisdictional statement in *United States v. State of Mississippi*, No. 79-504. We there argued (J.S. 16-17) that the district court had applied the 60% breakpoint too rigidly, by failing to acknowledge that, with a majority of the voting-age population, blacks have at least *some* possibility of electing a candidate of their choice, but that, with less than a majority, blacks have no such possibility. There is no inconsistency between that position and our view that, in order to have an *equal* chance of electing a candidate of their choice, blacks in Warren County must constitute 60% of a district's voting-age population.

facts of this case differ significantly from those of *Beer*.⁷

It is said (J.S. 20) that under *Beer*, the district court in an action for preclearance of a reapportionment plan may compare data on total population and registered voters, but lacks authority "to examine the entire social, economic and political environment of a covered jurisdiction or to scrutinize submissions to ferret out 'fragmentation and dilution' of black population concentrations." This narrow reading of *Beer* is unwarranted. Retrogression is measured by the effect of a change upon "the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. at 141. The meaning of "effective exercise" will vary from case to case, and it necessarily involves an examination of the particular circumstances bearing on political participation.

In the present case, the proposed reapportionment plan would result in a decrease in black voting-age population in one district and an increase in another

⁷ In *Beer*, this Court compared the proposed apportionment plan for electing members of the New Orleans City Council with the existing plan and found that the proposed plan enhanced the position of blacks with respect to effective exercise of the franchise. This conclusion was based upon the fact that, under the proposed plan, blacks would constitute (1) a majority of the population in two districts and (2) a clear majority of the registered voters in one district. Under the existing plan, there was no district in which blacks were a clear majority of the registered voters and only one district in which blacks constituted a majority of the population. 425 U.S. at 141-142.

district. In evaluating the significance of such a change, the district court properly considered not only those basic statistics,⁸ but also their context. That includes such matters as the history of political participation by blacks in Warren County, the effects of past discrimination, the results in county elections, and the relative rates of voter registration and voter turnout for blacks and whites. In this way, the district court was able to assess the effect of the proposed plan on the effective exercise by blacks of the franchise.

3. As a second ground for its denial of a declaratory judgment preclearing the 1978 plan, the district court held that appellants had failed to demonstrate the absence of discriminatory purpose (J.S. App. 12a). This holding was based on the Court's determination that appellants had failed to justify either "the diminution of black voting strength under the proposed plan" or "the grossly irregular proposed district boundaries in the City of Vicksburg which fragment black residential areas" (*ibid.*).

The court accurately observed that the districts in the 1978 plan are not compact, and that they follow irregular boundaries through the City of Vicksburg (J.S. App. 6a). For example, District 4 consists of two virtually noncontiguous portions joined by a narrow stretch of river bed (*ibid.*). Within Vicks-

⁸ It is by no means clear that the appellants are correct in assuming that, if the evidence were limited to the statistics, the appellants would meet their burden of establishing the absence of discriminatory effect.

burg, a narrow corridor of District 4, a predominantly white district, cuts through a black residential area, fragmenting it among three districts.⁹ Indeed, a single block where blacks reside is divided among the three districts (J.S. App. 6a).

It was incumbent upon appellants to justify these and other aspects of their plan and to prove the absence of discriminatory purpose. None of the asserted criteria for the drafting of the 1978 plan—equalization of road and bridge maintenance, equalization of population, retention of existing election districts, or availability of polling places—adequately explained the district lines within the City of Vicksburg. The district court noted, for example, that equalization of road and bridge maintenance is not a justification for the proposed lines within Vicksburg, because the county does not maintain bridges or roads within the city (J.S. App. 7a).

The 1978 plan did achieve equalization of population among the districts, but appellants failed to show that there were no alternatives that would achieve that objective without severely fragmenting black population concentrations in Vicksburg (J.S. App. 8a). Regarding the stated criterion of retaining existing election districts, the district court found that the proposed plan did not leave intact any of the former precincts within Vicksburg (J.S. App. 7a).

⁹ See the map contained in the supplement to the jurisdictional statement.

Having found that appellants had "offered no valid nonracial justification for the district lines within the City of Vicksburg which result in irregular shaped districts, fragment the black community and cause a diminution in black voting strength" (J.S. App. 10a), the district court properly concluded that appellants had not met their burden on the question of discriminatory purpose.

4. The final issue¹⁰ relates to the decision of the district court not to retain jurisdiction after its denial of a declaratory judgment.¹¹ Appellants cite *City*

¹⁰ In their jurisdictional statement (page 3), appellants list as one of the questions presented the issue of the constitutionality of Section 5. They do not, however, address this issue in their argument. Moreover, this issue was not raised by appellants in the district court and is not discussed in the district court's opinion. Accordingly, it is not properly before the Court in this case.

In any event, as noted in *Beer, supra*, 425 U.S. at 133, the constitutionality of Section 5 was upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The position of the United States is fully set forth in our brief in *City of Rome v. United States*, No. 78-1840. We are sending appellants a copy of that brief.

¹¹ On July 31, 1979, appellants filed a motion in the district court requesting that its decision regarding preclearance be issued as soon as possible. In addition, appellants requested that, if the district court were to deny preclearance, the court retain jurisdiction and establish an expedited schedule for submission of a new apportionment plan. On the same day, the decision of the district court was issued.

In support of their July 31 motion, appellants filed a memorandum urging the district court, in the event that it denied preclearance, to enjoin the holding of elections (under the

of *Petersburg v. United States*, 354 F. Supp. 1021, 1031 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973), in which, after denying preclearance of a proposed annexation, the district court retained jurisdiction and directed the city to prepare a city-council election plan complying with the Voting Rights Act.¹²

Under Section 5, the obligation to obtain preclearance is placed upon the covered states and political subdivisions. The role of the United States District Court for the District of Columbia is to determine whether to issue a declaratory judgment of preclearance. Ordinarily, upon the granting or denying of such a motion, the court's task is concluded. At most, the question of retaining jurisdiction "in order to expedite preclearance proceedings" (J.S. 25) is a matter within the district court's discretion. Appellants have not shown that, in declining to retain jurisdiction and to enjoin the holding of elections under the 1929 plan,¹³ the district court exercised its discretion improperly.

Insofar as appellants sought to expedite the submission of a new apportionment plan, their motion

1929 plan), pending submission of a new plan complying with the court's interpretation of Section 5.

As noted above, on August 30, in response to a motion by the intervenors in this case, the district court entered an order of clarification stating that an election should be conducted under the 1929 plan, "pending preclearance of any new procedures" (J.S. App. 13a).

¹² See the discussion of *Petersburg* in *City of Richmond v. United States*, 422 U.S. 358, 370 (1975).

¹³ See note 11, *supra*.

was unnecessary. The denial of preclearance for one plan in no way limited the power of the Board of Supervisors to adopt and to seek preclearance for a new plan. The Board could, at any time, have adopted a new plan and could have asked that it be considered by the same three-judge court.

To the extent that appellants sought to enjoin use of the 1929 plan, their motion is moot. The related lawsuit in the Mississippi court, *Stokes v. Warren County Election Commission*, *supra*, resulted in a temporary restraining order against use of the 1929 plan (J.S. App. 24a) and then an order adopting an interim plan and requiring a special election under the interim plan (J.S. App. 25a).¹⁴

CONCLUSION

The judgment of the district court should be affirmed.

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NOVEMBER 1979

¹⁴ It should be noted that the September 20, 1979, order of the *Stokes* court adopting an interim plan includes the following (J.S. App. 30a): "In the event that Warren County receives clearance of a redistricting plan * * * under Section 5 * * * whether in *Donnell v. United States* or by other means, they may apply to this court for * * * equitable relief * * *."